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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL ERWINE, an individual,

Plaintiff,

vs.

CHURCHILL COUNTY, a political subdivision
of the State of Nevada; and DOES 1 through 10
inclusive,

Defendants.

CASE NO. 3:18-cv-00461-RCJ-WGC

REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION TO
ENFORCE SETTLEMENT [ECF NO.
31]

COMES NOW Defendant, CHURCHILL COUNTY, by and through its attorneys of record, Thorndal Armstrong Delk Balkenbush & Eisinger, and hereby submits its reply memorandum of points and authorities in support of the motion to enforce the settlement agreement reached at the Early Neutral Evaluation held on February 4, 2019. As shall be set forth herein, the Plaintiff's arguments as to why the Court should not enforce the settlement agreement reached at the ENE are without merit and it is patently obvious that the Plaintiff wishes to withdraw from the settlement agreement simply because he has changed his mind. The precedent of the Ninth Circuit Court of Appeals and this Court do not sanction such action and the settlement agreement negotiated in good faith at the ENE should be enforced and the Defendant's motion granted.

I**Underlying Facts**

In his opposition, the Plaintiff contends that he believed that the settlement agreement reached at the ENE was “non-binding” and was one from which he believed he was entitled to withdraw in his discretion based upon statements of this Court at the conclusion of the ENE. An actual review of the transcript of the proceedings obtained by Plaintiff’s counsel demonstrates that such an argument is wholly without merit.

That the Plaintiff manifested his agreement to the settlement at the ENE cannot be seriously contested. The Court explicitly canvassed the Plaintiff on the question of his understanding of, and agreement to, the settlement at the conclusion of the ENE. Specifically, the following exchange took place between the Court and the Plaintiff:

Court: So I’m going to start with Mr. Erwine. Have you agreed in this particular case to dismiss this case and all claims, whether raised or unraised, in this litigation for the following settlement: First, for a \$10,000 settlement, also for the scrubbing, the removal from your employment record of certain documents and records that are in your personnel file, together with a mutual recommendation that will be consistent with the requirements of NRS Section 239B.020?

Erwine: Yes.

See, ECF No. 34, Exhibit 1, p. 4, lines 12-22.

The Court went on to specify that the settlement check was to be made payable to his attorney’s trust account (to which the Plaintiff responded in the affirmative) and that the Defendant was to have 30 days from execution of the written settlement agreement to tender the settlement check to the Plaintiff (to which the Plaintiff also responded in the affirmative). *Id.* at p. 4, lines 23-25 and p. 5, lines 1-11. The Court further clarified, on the record, that the Plaintiff understood that the settlement into which he was entering was to include a release of all claims,

1 whether raised in the case or not, and the Plaintiff, once again, responded in the affirmative. *Id.*
 2 at p. 5, lines 13-18.

3 The only contingent nature of the settlement terms was that the undersigned and counsel
 4 for the Plaintiff were to meet within 30 days of the date of the ENE to discuss which records
 5 were to be scrubbed or removed from the Plaintiff's personnel file and to discuss the specifics
 6 regarding the County's obligations under NRS 239B.020.¹ *Id.* at p. 5, lines 19-25 and p. 6, lines
 7 1-3. The Plaintiff acknowledged his understanding of those terms of the settlement, as well. *Id.*
 8 at p. 6, line 3.

10 Notably, the Court then made the following remarks as to the terms of the settlement:

11 Court: And that if they are unable to agree on any of those particular conditions
 12 or documents, that your attorney, as well as Ms. [Parks], will file a joint
 13 status report under seal with the Court within 14 days of that particular
 14 meeting, and together with that document they will also file under seal any
 15 disputed documents to be presented to the Court.

16 *Id.* at p. 6, lines 4-11. The Court then asked the Plaintiff if he understood this aspect of the
 17 settlement agreement, to which the Plaintiff responded, "[y]es." *Id.* at line 12.

18 The Plaintiff makes much in his opposition about the fact that counsel for the parties did
 19 not file a report with the Court regarding the status of the settlement and Plaintiff seems to
 20 suggest that this fact somehow supports his refusal to go through with the settlement. In fact,
 21 Plaintiff makes the argument that the purported failure of counsel to file a "status report and
 22 request a hearing on the matter" suggests that Churchill County has waived its right to enforce
 23 the settlement. *See*, ECF No. 34, p. 6, lines 10-14. This argument is completely meritless.
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 27 ¹As was set forth in the Defendant's motion, there was some difficulty in terms of scheduling a meeting with Mr.
 28 Guinasso and the documents requested to be removed from the Plaintiff's personnel file were not provided to
 counsel for Churchill County until March 4, 2019. *See*, ECF No. 31, Exhibit 1. Three days later, the undersigned
 agreed to the removal of all requested documents from the Plaintiff's personnel file and provided Mr. Guinasso with
 a draft Release of All Claims (which included reference by bate-stamp number to the specific documents to be
 removed from Plaintiff's personnel file). The Plaintiff should not be permitted to use the timing of any such
 discussions as an excuse to refuse to comply with the settlement reached at the ENE.

1 Even a cursory review of the transcript of the ENE proceedings demonstrates that the Court
2 made clear that the parties were required to provide the Court with a status report *only if* the
3 parties could not agree on the documents to be removed from the Plaintiff's personnel file or the
4 language in the settlement agreement which related to NRS 239B.020. The fallacy of the
5 Plaintiff's argument in this regard is that *there was no disagreement* as to those conditions. As
6 was acknowledged by Jason Guinasso at the status conference of April 5, 2019, Churchill
7 County agreed to remove ***all documents requested*** from the Plaintiff's personnel file. Further, at
8 no time did Mr. Guinasso (nor has Mr. Busby) advise that the language in the proposed Release
9 of All Claims as related to NRS 239B.020 is unacceptable. It is the position of the County that
10 the terms of the Release of All Claims are drafted as favorably as possible towards the Plaintiff
11 with respect to NRS 239B.020 and its requirements. The County will submit the Release of All
12 Claims to the Court as soon as the Court has ruled on the County's motion to file that document
13 under seal [ECF No. 32] or has otherwise instructed the County to provide a copy of that
14 document to the Court for review by other means. The argument that Churchill County has
15 somehow waived the right to enforce this settlement by failing to file a joint status report that
16 was to be filed only in the event the parties were in disagreement over the settlement terms is
17 ludicrous given that no disagreement has ever been identified.

21 More to the point, Churchill County has, at no time, suggested that the draft of the
22 Release of All Claims as sent to Mr. Guinasso on March 7, 2019, is somehow non-negotiable. In
23 fact, the opposite is true in that counsel for Churchill County sent the proposed Release of All
24 Claims to Mr. Guinasso and welcomed his input. *See*, ECF No. 31, Exhibit 2. At no point in
25 time since taking over as counsel for the Plaintiff has Mr. Busby requested that any revisions
26 whatsoever be made to the Release of All Claims, including those terms which relate to NRS
27 239B.020. Churchill County stands ready now, as it did in March, to discuss whatever proposed
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1 revisions to the Release of All Claims might be requested by the Plaintiff. Rather than
2 communicate with the undersigned regarding the draft release, the Plaintiff is simply using it as
3 an excuse to back out of the settlement agreement reached at the ENE.

4 The Court, in fact, expressly described the procedure the Court would employ in the
5 event that the parties could not agree on the documents to be removed from the Plaintiff's
6 personnel file (which is not an issue under the circumstances) or the terms of the settlement
7 agreement as related to NRS 239B.020. Specifically, the Court noted that, only if the parties
8 were unable to agree on those particulars, the parties would file a joint status report, under seal
9 with the Court, together with the disputed documents. *See*, ECF No. 34, Exhibit 1, p. 6, lines 4-
10 11. When the Court asked the Plaintiff if he understood the Court's directive in this regard, the
11 Plaintiff responded, "[y]es." *Id.* at p. 6, line 6.

12 In the event the parties could not so agree and such a status report was filed, the Court
13 would then, "hold a hearing to determine whether or not the parties can reach agreement on the
14 disputed documents." *Id.* at p. 6, lines 13-16. Once again, the Court asked the Plaintiff if he
15 understood the Court's intentions in that regard and the Plaintiff responded, "[y]es." *Id.* at p. 6,
16 line 17.

17 Thereafter, the Court stated as follows:

18 "And finally, if the parties and the Court are not able to agree and the parties reach an
19 impasse as to those particular documents that can and should be removed, or any of the
20 requirements under the statute, that you will have the right, as will the defendant will
21 have the right, to withdraw from this settlement. Do you understand that?"

22 *Id.* at p. 6, lines 18-24.

23 To the Court's question set forth at the end of the paragraph quoted above, the Plaintiff
24 responded, "[y]es." *Id.* at p. 6, line 25.

25 The Court then went through several more terms of the settlement, including those related
26 to a non-disparagement clause and the Plaintiff's future employment status with the County, and
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1 asked Mr. Guinasso whether there were any other terms of the agreement that needed to be
2 placed on the record, to which Mr. Guinasso responded as follows: “No, Your Honor. You’ve
3 covered all the material terms. Thank you.” *Id.* at p. 8, lines 10-15.

4 The Defendant’s representatives then confirmed their understanding of, and agreement to,
5 the terms of the settlement.

6 Finally, the Court thanked the parties for their efforts and made the following
7 observation: “Hopefully you guys can reach an agreement on all those documents and – without
8 having Court intervention, but if we have to come back, then I’ll be happy to see you when we
9 come back.” *Id.* at p. 13, lines 13-25 and p. 14, line 1.

10 As noted above, there was no disagreement as to the documents to be removed from the
11 Plaintiff’s personnel file, as Churchill County agreed to the removal of every document
12 requested. Further, there is no disagreement of which the County is aware concerning the
13 proposed written settlement agreement. The Plaintiff has attempted to argue that he believes he
14 is entitled to withdraw from this settlement agreement because the terms of the settlement
15 agreement do not, “resolve his concerns with NRS 239B.020.” *See*, ECF No. 34, p. 6, lines 8-9.
16 To date, neither of the Plaintiff’s attorneys has provided any details to Churchill County as to
17 how the language of the written settlement agreement does not comply with the terms of the
18 agreement reached at the ENE or how the terms of the written settlement agreement do not
19 comport with the obligations of the County under NRS 239B.020. The County stands ready to
20 discuss any reasonable revisions to the proposed written settlement agreement with respect to
21 those terms related to NRS 239B.020 and otherwise.

22 Per the terms of the settlement reached at the ENE, the Plaintiff should be required to
23 identify any disagreement with the terms of the Release of All Claims. The parties can then file
24 a joint status report with the Court, under seal, and present any “disputed documents” to the
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1 Court as contemplated at the conclusion of the ENE. The Court can then hold a hearing to
2 determine whether an agreement can be reached on the “disputed documents.” Only then, if the
3 Court and the parties are not able to reach an agreement, would the parties have a right to
4 withdraw from the settlement. *See*, ECF No. 34, Exhibit 1, p. 6.

5 This was the agreement reached by the parties at the ENE. The Plaintiff should not be
6 permitted to unilaterally declare an impasse concerning the Release of All Claims, while *never*
7 communicating *how* the agreement is not in accord with the terms of the settlement reached at
8 the ENE and while *never* communicating with Churchill County regarding any requested
9 revisions. The Plaintiff has simply changed his mind and is using the Release of All Claims as
10 an excuse as to why he should not be required to go through with the agreement reached on
11 February 4, 2019. He should not be permitted to do so.
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14 II

15 Legal Analysis

16 As was set forth in the Defendant’s motion, the Court has the inherent authority to
17 enforce settlement agreements between parties in pending cases. *See, City Equities Anaheim v.*
18 *Lincoln Plaza Dev. Co.*, 22 F.3d 954, 957 (9th Cir. 1994). The Ninth Circuit Court of Appeals
19 has made abundantly clear that behavior such as that exhibited by the Plaintiff in this case as it
20 relates to settlement agreements and, especially, those reached in court-conducted settlement
21 conferences, will not be tolerated. Per the Ninth Circuit, “[a]n agreement announced on the
22 record becomes binding even if a party has a change of heart after [she] agreed to its terms but
23 before the terms are reduced to writing.” *Doi v. Halekulani Corp.*, 276 F.3d 1131, 1138 (9th Cir.
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1 2001). The Ninth Circuit has further discussed the important policy consideration underlying this
2 legal precedent as follows:

3 “At a time where the resources of the federal judiciary, and this Circuit especially,
4 are strained to the breaking point, we cannot countenance a plaintiff’s agreeing to
5 settle a case in open court, then subsequently disavowing the settlement when it
6 suits her. The courts spend enough time on the merits of litigation; we need not
(and therefore ought not) open the flood gates to this kind of needless satellite
litigation.”

7 *Id.* at 1141.

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9 The Plaintiff in this case expressly agreed to all of the terms of the settlement discussed
10 herein. Further, the Plaintiff expressly agreed to the procedures that would be employed in the
11 event that the parties could not agree on either (1) the documents to be removed from the
12 Plaintiff’s personnel file or (2) the language in the Release of All Claims as it relates to NRS
13 239B.020. There is no disagreement over the documents to be removed from the Plaintiff’s
14 personnel file. To the extent there is a disagreement over the language in the Release of All
15 Claims, no such disagreement has been brought to Churchill County’s attention. In the event
16 there is such a disagreement, the agreed upon procedure includes submission of a joint status
17 report to the Court with any disputed documents, followed by a hearing before the Court for
18 further discussion of any such disagreement. Churchill County believes that the language of the
19 Release of All Claims as it relates to NRS 239B.020 fully complies with the terms of the
20 settlement agreement reached at the ENE. However, Churchill County is more than happy to
21 discuss any concerns the Plaintiff has concerning that language and any revisions he may
22 request.
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25 III

26 Conclusion

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28 The Plaintiff is not permitted to simply change his mind under the circumstances and
must be held to the terms of the enforceable settlement reached at the ENE. Accordingly,

1 Churchill County requests that the Court grant its motion and enforce the settlement agreed to on
2 February 4, 2019. At the very least, the Plaintiff should be required to identify any dispute or
3 disagreement over the only two conditions to the settlement; the documents to be removed from
4 his personnel file and the terms of the Release of All Claims as they relate to NRS 239B.020.
5 Thereafter, those documents could be submitted to the Court for consideration and for the
6 holding of a hearing as described by the Court at the conclusion of the ENE. *See*, ECF No. 34,
7 Exhibit 1, p. 6.
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9 Lastly, in the event the Court determines that the Defendant's motion should be granted,
10 the Defendant would request leave to provide the Court with a memorandum of attorney's fees
11 and costs associated with having been required to bring the instant motion. *See, Doi v.*
12 *Halekulani Corp.*, 276 F.3d 1131,1141 (9th Cir. 2001)(Ninth Circuit Court of Appeals affirmed
13 district court's order enforcing settlement and award of sanctions against the plaintiff in the
14 amount of \$1,000.00).
15

16 DATED this 26th day of April, 2019.
17

18 THORNDAL ARMSTRONG
19 DELK BALKENBUSH & EISINGER

20 By: /s/ Katherine Parks
21 Katherine F. Parks, Esq.
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28 Churchill County

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, and that on this date I caused the foregoing **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO ENFORCE SETTLEMENT [ECF NO. 31]** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

☒ United States District Court, District of Nevada CM/ ECF (Electronic Case Filing)

_____ personal delivery

_____ facsimile (fax)

_____ Federal Express/UPS or other overnight delivery

fully addressed as follows:

Luke Busby, Esq.
316 California Ave., #82
Reno, NV 89509
Attorney for Plaintiff

DATED this 26th day of April, 2019.

/s/ Laura Bautista
An employee of THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER